

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative
Penalty Order Issued to Thein Well
Rochester, Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came before Chief Administrative Law Judge Raymond R. Krause pursuant to a Notice and Order for Hearing dated September 7, 2010, and signed by Paul Eger, Commissioner of the Minnesota Pollution Control Agency (MPCA). A hearing was held on September 22, 2010, at the Office of Administrative Hearings, 600 N. Robert St., St. Paul, Minnesota.

Lawrence W. Fry, Assistant Attorney General appeared on behalf of the MPCA. Mark Thein, Vice President, Thein Well Rochester, Inc., appeared on behalf of the Respondent.

Chelsea Domeier, Pollution Control Specialist with the MPCA, was the only witness. MPCA exhibits 1 through 31F were admitted into evidence. The OAH record closed upon the conclusion of the hearing.

STATEMENT OF THE ISSUE

Whether the issuance of an Administrative Penalty Order (APO) to Respondent under Minn. Stat. § 116.072 was reasonable. The Administrative Law Judge finds that the APO was not unreasonable and was supported by the evidence.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mark Thein is the Vice President of Thein Well Rochester, Inc.¹ Thein Well Rochester, Inc., is a recently formed company. Thein Well Company of which Mark Thein was the owner was the subject of two past Administrative Penalty Orders.²

¹ Ex. 3.

² Ex. 30 B.

2. On July 23, 2009, a member of the public reported seeing a well drilling operation discharging “foamy liquid” into a nearby creek. The complaint was recorded on a Minnesota Duty Officer form and forwarded to the MPCA.³

3. Investigators of the MPCA and the Minnesota Department of Health (MDH) investigated the complaint. They found Thein Well Rochester employees on the site. The Thein employees were finishing up a well drilling operation for a new home recently constructed nearby. The MPCA and MDH investigators determined that drilling mud and/or foam were being discharged from a pipe at the drilling site onto a grassy area and eventually into Salem Creek. They also took several photographs of the site and the creek.⁴ A trench had been cut by Thein employees that diverted waste to a pipe that then led to a grassy area between the drill site and the creek.⁵

4. Salem Creek is a tributary of the South Fork of the Zumbro River. Salem Creek is an impaired water of the state. It is impaired for fecal coliform bacteria. The South Fork Zumbro River is also an impaired water of the state. It is impaired for turbidity.⁶

5. MPCA investigator Dave Morrison took samples of the water at the discharge site, at a point upstream of the discharge site and a point equidistant below the discharge site. The samples were sent to the MDH for analysis.⁷

6. The analysis of the samples by MDH revealed that the water above the discharge site had a turbidity level of 2.3 NTU and a suspended solids level of 3.6 mg/L. At the discharge site, the turbidity was measured at 29 NTU and suspended solids at 110 mg/L. Downstream from the discharge site, the turbidity measured 130 NTU and the suspended solids measured 160 mg/L.⁸ No tests were made to determine the nature of the suspended solids in the sample waters.⁹

7. The standards for Salem Creek are .20 NTU for turbidity, and 1.0 mg/L for suspended solids.¹⁰

8. Other preventative or mitigating measures were available that may have been more effective than simply spreading the effluent over a grassy area above the creek.¹¹

9. On October 29, 2009, the MPCA sent Mr. Thein a letter notifying him of alleged violations of Minn. R. 7050.0210, General Standards for Discharges to Waters of the State and Minn. Stat. § 115.061, Duty to Notify and Avoid Water Pollution. The

³ Exs. 16 and 24A-AA. Test. of Chelsea Domeier.

⁴ Exs. 17, and 24A-AA. Test. of C. Domeier.

⁵ Test. of C. Domeier.

⁶ *Id.*

⁷ Exs. 22 and 23.

⁸ Ex. 25.

⁹ Test. of C. Domeier.

¹⁰ Ex. 25 and Test of C. Domeier.

¹¹ Test. of C. Domeier.

notice also offered him the opportunity to submit information related to the alleged violations.¹²

10. On November 11, 2009, Mr. Thein responded in a letter outlining the measures taken by his crew to avoid discharges into Salem Creek. He also stated that Thein Well Rochester did not notify the MPCA of the discharge because it was not aware of any discharge. In the letter, Mr. Thein noted that the MPCA letter was addressed to Thein Well Company, while he now operates a completely different company entitled Thein Well Rochester.¹³

11. The MPCA uses a forum process in cases that may involve a non-forgivable penalty. Ms. Domeier prepared a Case Development Form and an Administrative Penalty Order Penalty Calculation Worksheet to facilitate a forum discussion in which the MPCA staff would determine what violations occurred and assess the appropriate penalty.¹⁴

12. In determining the appropriate penalty, the forum consulted the APO Penalty Calculation Guidance policy, which incorporates the factors to be considered under Minn. Stat. § 116.072, and provides guidance for determining the appropriate penalty amount. In calculating the base penalty, the Guidance policy and Worksheet use a matrix to determine whether the potential for harm to natural resources was minor, moderate or major, and whether the deviation from compliance was minor, moderate, or major.¹⁵

13. The Guidance policy and Worksheet permit the base penalty to be adjusted (enhanced or mitigated) for willfulness of culpability, history of past violations, economic benefit gained from the violation, and other factors as justice may require.¹⁶

14. The MPCA held a forum discussion on the alleged violations by Thein Well Rochester. The forum considered the information presented in the Case Development Form and determined that two violations had occurred and that those violations were serious. The forum reasoned that the violations were serious because they resulted in nuisance conditions to waters of the state; the Regulated Party (RP) failed to minimize, recover or abate the discharges to waters of the state and; exacerbated negatively the already impaired water. Failure to notify the State Duty Officer and the MPCA by a discharger is serious as it prevents the MPCA from being able to respond to a discharge in a timely manner.¹⁷

15. The MPCA determined that the violations were repeat violations based on the previous APO issued to Thein in 2002 and the APO issued in 2008.¹⁸

¹² Ex. 26.

¹³ Ex. 27.

¹⁴ Test. of C. Domeier.

¹⁵ Exs. 7-15; Test. of C. Domeier.

¹⁶ Ex. 12 and 13.

¹⁷ Ex. 14; Test. of C. Domeier.

¹⁸ Exs. 30A, and 31A; Test. of C. Domeier.

16. The MPCA determined that the Potential for Harm factor was Major and that the Deviation from Compliance factor was Major. The MPCA reasoned that the potential for harm was realized and is Major because: 1) there was a direct discharge of industrial waste water to waters of the state; 2) the water discharged is very high in TSS [Total Suspended Solids], and negatively exacerbates this impaired water; and 3) Salem Creek is already impaired for fecal coliform and the Zumbro River is impaired for Turbidity.¹⁹

17. The deviation from compliance is considered Major because: 1) the regulated party failed to notify the MPCA, and 2) did not use effective best management practices (BMP's) to minimize, abate or prevent pollution to waters of the state. The immediate notification to the MPCA allows the MPCA to adequately respond to discharges and make appropriate evaluations to determine what actions should be taken to prevent further impact to the environment and recovery of waste materials. It is also critical that the RP rapidly recover discharged material and take actions to minimize pollution in order to minimize the environmental impact from the discharge to the receiving waters of the state.²⁰

18. The MPCA determined the base penalty range for a major potential for harm and a major deviation from compliance was \$5,000 to \$10,000. The MPCA set the base penalty amount at \$5,000. The MPCA matrix for calculating the base penalty is shown below:²¹

		Deviation from Compliance		
		Minor	Moderate	Major
Potential For Harm	Major	\$5,000 to \$2,000	\$8,000 to \$3,500	\$10,000 to \$5,000
	Moderate	\$2,000 to \$500	\$3,500 to \$1,000	\$5,000 to \$2,000
	Minor	\$500 to \$0	\$1,000 to \$200	\$2,000 to \$500
		Base Penalty Range		

19. The forum addressed the enhancement or mitigation of the base penalty by considering the factors of willfulness/culpability, history of past violations, other factors such as justice may require, and economic benefit. The forum determined that a

¹⁹ Ex. 14.

²⁰ Ex. *Id.*

²¹ Ex. 14; Test. of C. Domeier.

40 percent enhancement was appropriate because of Thein's prior violations in 2002 and 2008. The penalty was also enhanced 10 percent for willfulness/culpability.²²

20. The forum determined that the penalty was non-forgivable because the violations were serious.²³

21. On February 12, 2010, the MPCA issued an APO to Thein Well Rochester, Inc. The cover letter and the APO apprised the company of the violations, the amount of the penalty (\$7,500 non-forgiveable), and the company's right to administrative review.²⁴

22. On March 10, 2010, Thein Well Rochester timely requested an administrative hearing.²⁵

23. Thein Well Rochester waived the requirement of an expedited hearing.²⁶

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Minnesota Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14.57 – 14.62 and Minn. Stat. § 116.072.

2. The Notice of and Order for Hearing in this matter was proper.

3. The Department has satisfied all other all relevant substantive and procedural requirements of law and rule, and this matter is properly before the Administrative Law Judge.

4. The MPCA has the burden to establish by a preponderance of the evidence that Thein Well Rochester violated applicable laws or rules and that issuance of the Administrative Penalty Order was warranted. If the violations are established, the Administrative Law Judge may not recommend a penalty different in amount than that contained in the Administrative Penalty Order unless the amount of the proposed penalty is determined to be unreasonable, after considering the factors set forth in Minn. Stat. § 116.072, subd. 2(b).²⁷

5. The MPCA proved by a preponderance of the evidence that Thein Well Rochester discharged industrial wastewater to waters of the state (Salem

²² *Id.*

²³ *Id.*

²⁴ Exs. 1 and 2.

²⁵ Ex. 3.

²⁶ Ex. 6.

²⁷ Minn. Stat. § 116.072, subd. 6(c).

Creek), and that this discharge caused nuisance conditions of excessive suspended solids, material discoloration and turbidity in violation of Minn. R. 7053.0205, subp. 2.

6. The MPCA proved by a preponderance of the evidence that Thein Well Rochester discharged wastewater to waters of the state (Salem Creek) and that this discharge caused pollution of excessive suspended solids in violation of Minn. R. 7050.0210, subp. 13.

7. The MPCA proved by a preponderance of the evidence that Thein Well Rochester failed to notify the MPCA that a discharge of wastewater to waters of the state had occurred, that Thein Well Rochester also failed to rapidly recover discharged material and take actions to minimize and abate the pollution, in violation of Minn. Stat. § 115.061.

8. Under Minn. Stat. § 116.072, subd. 3, an Administrative Penalty Order must include “a concise statement of the facts alleged to constitute a violation” and “a reference to the section of the statute, rule, ordinance, variance, order, stipulation agreement, or term or condition of a permit or license that has been violated.” The MPCA provided adequate notice of violations under this provision.

9. The Commissioner has the authority to assess penalties of up to \$10,000 for violations of MPCA regulations. Pursuant to Minn. Stat. § 116.072, subd. 2(b), the Commissioner may consider the following factors in determining the amount of the penalty:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require.

10. Thein’s prior violations, for which it was issued an APO in 2002, and 2008, are relevant to the current APO. Mark Thein was in control and had supervisory authority over Thein Well Company as well as Thein Well Rochester.

11. For a repeated or serious violation, the Commissioner may issue an order with a penalty that will not be forgiven after the corrective action is taken, in accordance with Minn. Stat. § 116.072, subd. 5(b). The MPCA has shown that the present violations were serious, and therefore, a non-forgivable penalty is appropriate.

12. Based upon a consideration of all of the statutory factors, and for the reasons discussed in the Memorandum, the \$7,500 penalty assessed by the MPCA against Thein Well Rochester is not unreasonable and is supported by the record in this matter.

13. Any Finding of Fact more properly termed a Conclusion is adopted as such. Any Conclusion more properly termed a Finding of Fact is adopted as such.

14. These Conclusions are reached for the reasons discussed in the following Memorandum, which is hereby incorporated into these Conclusions.

Based upon the above Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner AFFIRM the violations and penalty set out in the Administrative Penalty Order issued on February 12, 2010, to Thein Well Rochester, Inc.

Dated: September 30, 2010

s/Raymond R. Krause
RAYMOND R. KRAUSE
Chief Administrative Law Judge

Reported: Digitally recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency (the MPCA) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 90 working days to issue his final decision. Parties should contact Paul Eger, Commissioner of the Minnesota Pollution Control Agency, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, 651-296-6300, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Mr. Thein chose not to testify as a witness in this matter. No evidence was introduced by Respondent to contradict the evidence produced by the MPCA. Mr. Thein, in his closing argument, suggests that the sample methodology taken in this case was flawed because the sampler chose a clear spot in the creek above the discharge site and a polluted spot downstream of the discharge. He argues that the sample sites were not random but chosen to make worst case examples. He believes his enterprises have been unfairly singled out for enforcement actions over the years. He alleges that he did use exemplary methods to protect the site and that there was no practical way to recover the pollutants once they entered the creek. Finally, he argues that the APO's issued in 2003 and 2008, should not be used to calculate the penalty since they involved a different company.

The MPCA has clearly and convincingly proven that contaminants from the well drilling site entered the waters of Salem Creek. Whether the contaminants were drilling mud, drilling foam, or limestone cuttings is irrelevant. Any of these substances are considered pollutants under the statute encompassing this violation. Whatever the substance was, there was enough of it to render samples that were over five times the standards set for Salem Creek. In addition, the discoloration was so significant that it was first reported by a pilot flying an airplane above the site. Even if one were to completely disregard the water samples and the analysis done by MDH, it is incontrovertible that the water of Salem Creek was discolored by discharges from the Thein well site. Discoloration alone is sufficient to violate Minn. R. 7050.0210, subps. 2 and 13.

Mr. Thein does not dispute that the pollution emanated from his drilling operation. Also he does not dispute that neither he nor anyone from his company reported the spill. His argument that there was no notification because no one was aware of the spill is belied by the fact that they knew the creek was nearby and that their discharge would run down hill toward the creek.

Thein's employees did use a "best management practice" by spreading the effluent over a grassy area. Unfortunately, the best management practices that were used were ineffective to prevent the spill. Since the grassy area was on a slope leading down to the creek it was not reasonable to believe that spreading the waste there as the only BMP would be an effective preventative measure. A regulated party is not absolved from responsibility for a spill simply because it used one BMP that was ineffective under the circumstances in that particular situation. Other preventative or corrective measures were available to the drilling team in this situation.²⁸

²⁸ Test. of C. Domeier.

The MPCA did not err when it considered the previous APO's that were upheld against Thein Well Company. Although Thein Well Company may be a different corporation than Thein Well Rochester, Mark Thein had some control, responsibility and/or supervisory authority over both entities. In such a case, it is not unreasonable to link the compliance history of both entities.²⁹

Finally, Mr. Thein's argument that he is being unfairly singled out for enforcement action is not an issue over which this tribunal has authority. In this case the violations were proven and the consequences were reasonable.

R. R. K.

²⁹ See Ex. 12, p. 2.